BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

NOOR A. AHMED Claimant v.	)	
	)	Docket Nos. 1,062,468 & 1,062,469
CARGILL MEAT SOLUTIONS CORP. Respondent and	)	
AIG ASSURANCE COMPANY Insurance Carrier	)	

ORDER

Claimant requests review of the August 7, 2015, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on December 15, 2015.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for claimant. D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

In Docket No. 1,062,468 (date of accident March 13, 2012), the ALJ found claimant sustained a 10 percent permanent functional impairment to the hand, consisting of a 5 percent impairment to both the right and left hands. Unauthorized medical was awarded.

In Docket No. 1,062,469 (date of accident April 27, 2012), the ALJ found claimant did not prove permanent impairment to his neck, right arm and right shoulder, and awarded no compensation other than unauthorized medical.

Future medical treatment was denied in both claims.

Claimant argues the Board should: (a) modify the Award and adopt the rating of Dr. Brown; (b) award permanent partial disability (PPD) benefits based on a 10 percent impairment of his right hand and bilateral finger injuries in Docket No. 1,062,468; and (c) award PPD based on a 5 percent impairment to the whole body for his neck, right shoulder and arm injuries in Docket No. 1,062,469. Claimant also contends he is entitled to future medical treatment, unauthorized medical, and the right of review and modification.

Respondent maintains: (a) Dr. Brown's opinions are not credible; (b) claimant's two treating physicians, Drs. Hunsberger and Garcia, released claimant with no restrictions; and (c) claimant's injuries have resolved without permanent impairment of function. Respondent requests the Board deny compensation entirely.[1]

The issues are:

1. What is the nature and extent of claimant's disability in both claims?

2. Is claimant entitled to unauthorized and future medical compensation?

FINDINGS OF FACT

Claimant's testimony

Claimant was injured in accidents on March 13, 2012, and April 27, 2012. In the March accident, claimant alleged injury to his right hand and fingers on both hands. In the April accident, injuries were claimed to his neck, right shoulder and right arm. Medical treatment was provided, consisting primarily of an injection just below his right middle finger and surgery and physical therapy for his left little finger. Physical therapy was also provided for his right shoulder.

Claimant asserted he experienced pain in all the fingers of his right hand, except his right thumb, at a level 5 or 6 out of 10. Claimant testified he requested physical therapy for his right hand, but such treatment was not provided by respondent.

According to claimant, he needs another surgery for his left small finger. Claimant testified he experienced pain from the second phalange of his left little finger into his left wrist. That finger sticks when he tries to bend it. Claimant asserted he experienced constant pain in his left little finger at a level of around 7. He testified his left small finger was worsening.

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[1] R.H. Trans. at 5-8. Respondent stipulated both claims were compensable.

Claimant alleged he had pain in his right shoulder extending to his neck, and pain "[t]hrough the whole [right] arm"[2] that was constant, but worse at night. According to claimant, his right shoulder, right arm and neck pain was 6 or 7, and was a shooting, stabbing pain. He could raise his right arm only to around 70 degrees and, if he tried to raise it higher, he experienced a painful pop. Claimant testified his neck pain was a 7, and went through his right ear and the whole right side of his face. Claimant claimed he was losing the hearing in his right ear.

Claimant testified he cannot use his right hand to drive a car, and cannot lift with his right arm. His pain affected his daily life, mentally and physically. He asserted he cannot work, has no place to live, was depressed and talked to himself. Claimant testified medication he received from a mental health clinic helped him.

Dr. Hunsberger's records

Terry Hunsberger, D.O., treated claimant from April 8, 2012, through June 27, 2013.

On April 26, 2012, claimant reported to Dr. Hunsberger that a trainer was showing him how to use a hook, which hit him in the left small finger at the PIP (proximal interphalangeal joint). The doctor found claimant had some edema, but had a full range of motion. Claimant also reported pain in the small finger on his right hand that claimant said was a 2, and pain in his left hand was a 3. Dr. Hunsberger interpreted left hand x-rays taken on April 27, 2012, as revealing no definite evidence of an acute fracture or dislocation, but showed soft tissue swelling on the dorsal aspect of the PIP joint of the left small finger.

When Dr. Hunsberger saw claimant on May 10, 2012, claimant's pain in his right hand had resolved, but he still had pain in his left small finger. Repeat left hand x-rays were negative. Dr. Hunsberger recommended claimant use ibuprofen and Tylenol, and warm moist heat. The doctor released claimant to return to work at full duty.

At claimant's third visit to Dr. Hunsberger on May 24, 2012, he complained of pain in both small fingers. His left hand pain had improved to a 2, but his right hand pain increased to a 6 at the metacarpophalangeal joint of the right small finger. Right hand x-rays taken on May 25, 2012, showed normal bony alignment; no acute fracture or dislocation; no bony erosion or periosteal reaction; and no radiopaque foreign bodies.

Claimant returned to Dr. Hunsberger on May 31, 2012. He had bilateral small finger pain, a cyst on his left small finger and right hand pain. Since claimant's x-rays were

[2] R.H. Trans. at 14.

negative and conservative therapy had failed, Dr. Hunsberger referred him for an orthopedic evaluation.

On September 20, 2012, Dr. Hunsberger discussed probable surgical treatment to remove the cyst on claimant's left small finger.

Dr. Hunsberger next saw claimant on May 30, 2013, for pain in his right shoulder caused by pulling meat. Claimant's pain was a 7 from his neck to his right fingers. Claimant had been terminated by respondent some time before. Dr. Hunsberger recommended x-rays, physical therapy, and ibuprofen or Tylenol for his right shoulder. Dr. Hunsberger's diagnosis was tendinitis. Claimant's right shoulder x-ray of May 30, 2013, showed no fracture, normal bony alignment, no degenerative changes, soft tissue unremarkable and no radiographic evidence of acute osseous right shoulder injury.

Claimant again saw Dr. Hunsberger on June 27, 2013. Claimant was seen by Dr. Garcia for his left small finger and had an injection to his right middle finger. Claimant reported the injection was ineffective and he had pain in his right shoulder and elbow up to his right eyeball. Claimant reported his pain was 10, but he showed no grimace or physical indication of pain. On examination, Dr. Hunsberger found a full range of motion of the right shoulder, elbow, wrist and fingers. Claimant missed several physical therapy appointments, which he said were not helping. Dr. Hunsberger noted claimant was a non-compliant patient. Dr. Hunsberger found he was at maximum medical improvement (MMI), and "returned him back to his normal duty without restrictions or disabilities."[3]

Dr. Garcia's records

Guillermo E. Garcia, M.D., saw claimant initially, on referral from Dr. Hunsberger, on July 12, 2012. Dr. Garcia treated claimant until April 18, 2013.

Claimant reported triggering of his right middle finger, a catching and locking sensation, and being unable to completely straighten that finger. He also reported pain, but no locking, in his right ring finger. On physical examination, Dr. Garcia found significant pain of the flexor tendon sheath of the right middle finger. Dr. Garcia diagnosed trigger finger of the right middle finger and on July 26, 2012, claimant received an injection just below his right middle finger. Dr. Garcia thereafter noted claimant was doing quite well, and had no further catching or locking, only mild discomfort. Dr. Garcia noted the right trigger finger had resolved with the injection.

On November 1, 2012, Dr. Garcia rated claimant at 5 percent to the left small finger.

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[3] Stipulation (Dec. 26, 2014), Hunsberger Records, Chart Entry, June 27, 2013.

Dr. Garcia noted a cyst at the PIP joint of his left small finger. The cyst did not interfere with extension or flexion, but was painful. The doctor diagnosed trauma to the PIP joint of the left small finger and advised the cyst be excised.

On February 7, 2013, Dr. Garcia performed an excision of the cyst on the PIP joint of the left small finger and repaired a ruptured extensor tendon.

In a post-surgical follow-up on March 7, 2013, Dr. Garcia prescribed physical therapy. Dr. Garcia last saw claimant on April 18, 2013. Claimant's incision was healed, with full extension, full flexion and no sensory changes. The doctor released claimant without restrictions, and determined claimant had no disability.

Dr. Brown's report

C. Reiff Brown, M.D., examined claimant on October 8, 2013, at the request of his counsel. Dr. Brown was not able to explain claimant's complaints of pain and numbness in his right eye extending down his face, neck, chest and right side of his body. Dr. Brown knew of no medical condition that could cause such symptoms.

For claimant's March 13, 2012, accidental injury, Dr. Brown opined claimant sustained a 44 percent permanent impairment of the left small finger, which the doctor converted, under the AMA *Guides*,[4] to 5 percent to the left hand. Dr. Brown also found a 5 percent permanent impairment of function to the right hand. The total impairment for the March 13, 2012, injury, encompassing the 44 percent to the left small finger, extrapolated to 5 percent of the left hand, and the 5 percent impairment to the right hand, was 10 percent impairment to the hand. The ALJ apparently "merged" the left and right hand impairments, which then totaled the 10 percent "hand" impairment.

For the April 27, 2012, injury, Dr. Brown rated claimant at 5 percent permanent impairment of function to the right arm and right shoulder.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b provides in part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

K.S.A. 2011 Supp. 44-508(h) provides:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510d provides in relevant part:

(b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . .

(5) For the loss of a fourth finger, commonly called the little finger, 15 weeks.

. . .

(11) For the loss of a hand, 150 weeks.

. . .

(23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(24) Where an injury results in the loss of or loss of use of more than one scheduled member within a single extremity, the functional impairment attributable to each scheduled member shall be combined pursuant to the fourth edition of the American medical association guides for evaluation of permanent impairment and compensation awarded shall be calculated to the highest scheduled member actually impaired.

K.S.A. 2011 Supp. 44-510e(a) provides in relevant part:

(2) (A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

> (i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;

K.S.A. 2011 Supp. 44-525(a) states, in part:

> No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of claimant and any other testimony that may be relevant to the question of disability; the trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[5]

The Board finds as follows:

1. With respect to Docket No. 1,062,469, the Board finds claimant did not sustain his burden to prove permanent impairment of function to his neck, right shoulder, right arm or right wrist. Claimant's own medical witness, Dr. Brown, stated in his report:

> In my opinion, [claimant] has complaints that I am unable to explain. For instance, he has a pain and numb feeling that starts in his right eye and extends down the side of his face, neck, chest and [the] right side of his body. He attributes these symptoms to his work activity, however I do not know of any medical condition that would cause such symptoms.[6]

Moreover, Dr. Hunsberger, an authorized treating physician, found claimant had a full range of motion in his right shoulder, right elbow and wrist without any positive objective findings. Although Dr. Brown found a 5 percent impairment to claimant's right shoulder and arm, the Board is persuaded the preponderance of the credible evidence establishes claimant sustained no permanent impairment resulting from his April 27, 2012, accident. Dr. Brown's rating of claimant's right arm and shoulder is effectively offset by the findings of Dr. Hunsberger, who found no objective manifestations of a permanent functional impairment and opined claimant had no disability for the injuries alleged in this claim. Claimant's own testimony lacks credibility because his complaints make no sense from a medical standpoint, as explained by Dr. Brown in his report. Claimant's believability is

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[5] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Board notes, however, *Tovar* was decided before the 2011 amendments to the Act.

[6] Stipulation (Dec. 26, 2014), Brown Records, Report, Oct. 8, 2013, at 2.

further impaired by, despite having complaints of severe pain, failing to attend some of his therapy sessions and Dr. Hunsberger's conclusion claimant was noncompliant with treatment.

2. In Docket No. 1,062,468, the Board finds claimant proved he sustained a 5 percent permanent impairment of function to his right hand and a 22 percent permanent functional impairment to his left small finger. The Board finds some credibility in all the evidence on this issue.

Dr. Brown found a 44 percent impairment to the left small finger, which he converted, utilizing the AMA *Guides*, to a 5 percent impairment to the left hand. However, there is no evidence to support the notion that claimant sustained impairment to any part of his left upper extremity other the left small finger. The situs of the disability dictates what benefits are allowed.[7] Just because a physician can convert a rating under the AMA *Guides* to the next higher level of impairment does not mean a claimant actually sustained permanent functional impairment at such higher level.[8] Dr. Garcia rated claimant's impairment on November 1, 2012, at 5 percent to the left small finger, and at "no disability" on April 18, 2013. The Board finds claimant sustained a 22 percent permanent functional impairment to his left small finger as a result of his March 13, 2012, accident.

With regard to the right hand, on July 26, 2012, Dr. Garcia concluded claimant's right trigger finger was resolved following an injection slightly below the right middle finger. Dr. Brown found claimant sustained a 5 percent impairment to the right hand as a result of stenosing tenosynovitis. Dr. Brown found loss of range of motion to multiple fingers on the right hand, and thickening of the tendon sheaths at the palmar surface of the right hand. The Board finds claimant sustained a 5 percent permanent impairment of function to the right hand.

Accordingly, the Board finds claimant is entitled, in Docket No. 1,062,468, to PPD based on a 22 percent permanent impairment of function to the left small finger and 5 percent to the right hand.

The right hand and left small finger impairments should not combined. Claimant is entitled to compensation for two separate scheduled injuries, one for the left small finger and the other for the right hand.

3. The ALJ correctly denied future medical treatment in both claims. Claimant presented no evidence future treatment will be required, other than his own opinion that

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[7] *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

[8] See *Redd v. Kansas Truck Center*, 291 Kan. 176, 196, P.3d 66 (2010).

additional surgery will be needed for his left small finger injury. There is no basis for that opinion, and no medical evidence was offered to support an award of future medical treatment in either claim.

4. Claimant raises issues regarding unauthorized medical, but the ALJ awarded the $500 statutory maximum in each docket number. Also mentioned in claimant's application for Board review was an issue of leaving review and modification open. It is unnecessary for the Board address that issue because, under K.S.A. 44-528(a), review and modification remains open as a matter of law.

CONCLUSIONS

1. Claimant is entitled to PPD as follows:

In Docket No. 1,062,468 (date of accident March 13, 2012), claimant proved he sustained permanent impairment of function of 5 percent to the right hand and 22 percent to the left small finger.

In Docket No. 1,062,469 (date of accident April 27, 2012), claimant did not prove he sustained any permanent impairment of function to his neck, right arm and right shoulder.

2. Claimant did not prove he will require any future medical treatment in either docket number and no such treatment is awarded. As detailed above, the Board need not address unauthorized medical or review and modification.

AWARD

WHEREFORE, it is the Board finds the Award of Administrative Law Judge Pamela J. Fuller dated August 7, 2015, is modified as specifically set forth in this Order.

In Docket No. 1,062,468, claimant is entitled to 7.50 weeks of permanent partial disability compensation, at the rate of $335.74 per week, in the amount of $2,518.05, for a 5 percent loss of use of the right hand, and 3.30 weeks of permanent partial disability compensation, at the rate of $335.74 per week, in the amount of $1,107.94, for a 22 percent loss of use of the small (4th) finger, for a total due and owing of $3,625.99.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Pamela J. Fuller, ALJ.